Lee Cheng Yee (suing as administrator of the estate of Chia Miew Hien) v Tiu Soon Siang t/a Tiyor Soon Tiok & Sons Company & Anor

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO C–02–42 OF 1998

MOKHTAR SIDIN, PS GILL AND RAHMAH HUSSAIN JJCA

19 SEPTEMBER 2003

Civil Law Act — Damages — Loss of earnings — Civil Law Act 1956 s 8 — Deceased unemployed at the time of death — Whether could claim for loss of earnings for the lost years of the deceased — Paucity of evidence on the personality of the deceased

Civil Law Act — Limitation — Civil Law Act 1956 s 7 — Claim made beyond three year period — Limitation not pleaded in statement of defence — Whether claim barred by limitation — Whether limitation must be pleaded

Civil Law Act — Limitation — Estate claim and dependency for damages — Whether limitation must be pleaded — Limitation absolute and without exceptions — Civil Law Act 1956 s 7(5)

The appellant brought a suit for negligence against the first and second respondents arising from the death of one Chia Miew Hien as a result of the alleged negligence of the second respondent driving a motor lorry owned by the first respondent. Two issues arose in this appeal. Firstly, on the issue of limitation under s 7(5) of the Civil Law Act 1956, whether in not pleading it, the respondent was prevented from relying on the defence of limitation. Secondly, whether the appellant's claim on behalf of the estate of the deceased for loss of earnings for the lost years of a deceased, can be allowed, if the deceased was unemployed at the time of death.

Held, dismissing the appeal with no order as to costs:

(1) A plea of limitation need only be pleaded where limitation is not absolute, such as under the Limitation Act 1953. It would not apply to a statute of limitation which is absolute and without exception (see para 12).

(2) In this case, s 7(5) of the Civil Law Act 1956, and equally s 7(5) of the Civil Law Act (as amended in 1984) are absolute in nature. Accordingly, there was no necessity to plead limitation (see para 12).

(3) Based on the evidence led by the appellant at trial, the court was unable to say with certainty, what the deceased's career prospects were going to be, if she would have gone back to the work force after the birth of her child, or have grown to enjoy the bliss of being a home maker (see para 17).

(4) The court found a paucity of evidence on the personality of the deceased. Evidence of persons acquainted with the deceased or references from previous employers would have served as an index of her personality and helped the court in its assessment. The court

found too much guesswork and speculation that it should refrain from engaging in. (see para 19).

[**Bahasa Malaysia summary**

Pihak perayu telah memfailkan tindakan untuk kecuaian terhadap responden pertama dan kedua berbangkit daripada kematian Chia Miew Hien akibat daripada kecuaian yang dikatakan oleh responden kedua yang memandu sebuah lori yang dimiliki oleh responden pertama. Dua isu berbangkit daripada rayuan ini. Pertama, di atas isu had masa di bawah s 7(5) Akta Undang-Undang Sivil 1956, sama ada dalam tidak memplidkan had masa, pihak responden dihalang daripada bergantung kepada pembelaan had masa. Kedua, sama ada tuntutan perayu bagi pihak estet simati untuk kehilangan pendapatan untuk tahun-tahun yang hilang simati, boleh dibenarkan, jika simati tidak mempunyai pekerjaan pada masa beliau mati.

Diputuskan, menolak rayuan dengan tiada perintah terhadap kos:

(1) Suatu pli had masa hanya harus diplidkan di mana had masa tidak mutlak, seperti di bawah Akta Had Masa 1953. Ianya tidak akan terpakai kepada suatu statut had masa yang mutlak dan tanpa kekecualian (lihat perenggan 12).

(2) Dalam kes ini, s 7(5) Akta Undang-Undang Sivil 1956, dan begitu juga s 7(5) Akta Undang-Undang Sivil (seperti dipinda pada 1984) adalah bersifat mutlak. Justeru itu, tidak terdapat keperluan untuk memplidkan had masa (lihat perenggan 12).

(3) Berdasarkan keterangan yang diberikan oleh pihak perayu pada perbicaraan, mahkamah tidak dapat menyatakan dengan nyata, apakah harapan kerjaya simati akan menjadi, sama ada beliau akan kembali bekerja selepas kelahiran anaknya, atau sama ada beliau akan berhenti dari bekerja sama sekali (lihat perenggan 17).

(4) Mahkamah menjumpai keterangan yang tidak mencukupi di atas keperibadian simati. Keterangan orang yang mengenali si mati atau rujukan daripada majikan dahulu, boleh dipakai sebagai petunjuk kepada keperibadian si mati dan membantu mahkamah dalam membuat penilaian. Mahkamah menjumpai terlalu banyak tekaan dan mahkamah tidak patut melibatkan diri (lihat perenggan 19).]

Notes

For cases on damages for loss of earnings, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) para 3309.

For cases on Civil Law Act 1956, s 7, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) para 3357.

For cases on estate claim and dependency for damages, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) para 3360.

Cases referred to

Chan Heng Wah & Anor v Peh Thiam Choh & Anor [1988] 1 MLJ 74 (refd)
Kuan Hip Peng v Yap Yin & Anor [1965] 1 MLJ 252 (refd)

Legislation referred to

Civil law Act 1956 ss 7(5), 8
Civil Law (Amendment) Act 1984 s 7(5)
Civil Law Ordinance s 7(5)

Appeal from: Civil Suit No 23-4 of 1989 (High Court, Kuantan)

Bastian P Vendargon (Vendaragon & Pts) for the appellant.
Jagjit Singh (Jagjit Singh & Co) for the respondent.

PS Gill JCA (delivering judgment of the court):

[1] The matters that confront us in this appeal are basically on the issue of limitation, whether in not pleading it in certain instances, a party is prevented from raising the defence of limitation, and whether a claim on behalf of the estate of a deceased person for loss of earnings for the 'lost years' of a deceased, is allowable, if the deceased was unemployed at the time of death.

[2] The administrator of the estate of Chia Miew Hien, one Lee Cheng Yee brought a suit for negligence against the first and second defendants, owner and driver of motor lorry bearing registration number TD 9278. As a result of the alleged negligence of the second defendant, the deceased Chia Miew Hien suffered massive injuries in a motor accident and died instantly.

[3] On perusing the notes of evidence, and the grounds of judgment we note that at the trial, learned counsel for the respondent/defendant had conceded to total liability.

[4] It was the contention of the respondent/defendant before the trial judge, and even before us that the appellant/plaintiffs reliefs were crafted under s 7 of the Civil law Act 1956. We wish to interpose at this stage to say that, the accident took place on the 13 March 1983, and therefore the Civil Law (Amendment) Act 1984 which came into effect on 1 October 1984, does not apply to this case.

[5] Hence, it was the argument of the respondent/defendant's counsel that since the cause of action arose in 1983, and it was a dependency claim, one must be guided by s 7 of the Civil Law Act 1956, more in particular s 7(5) of the said Act which reads as follows:

> Not more than one action shall be brought for and in respect of the same subject matter of complain, *and and every such action shall be brought within three years after the death of the deceased person*. (Emphasis added.)

[6] In connection with the present case it was the submission of the respondent/defendant's counsel that the suit was only filed on 13 January 1989, some five years after the death of the deceased in question.

[7] In his riposte, the appellant/plaintiff's counsel submitted that the issue of limitation was not specifically pleaded in the defence of the respondent, and neither was a request made that the matter be set down as a preliminary issue. As such, it was his submission that the respondent is not entitled to rely on the limitation to defeat the claim.

[8] We would in principle have been persuaded by this submission, but for the timely intervention of the respondent"s counsel who drew our attention to the case of *Kuan Hip Peng v Yap Yin & Anor* [1965] 1 MLJ 252. The brief facts of the case was that the plaintiff who in fact was suing by his next friend was claiming compensation under s 7 of the Civil Law Ordinance for loss arising from the death of his father as a result of the alleged negligent driving of a motor vehicle owned by the first defendant and driven by the second defendant. The alleged negligent driving occurred on 22 November 1960 and the plaintiff's father died on 23 November 1960.

[9] A writ was issued on 27 November 1963, ie four days after the expiry of the period of three years in contravention of s 7(5) of the Civil Law Ordinance. No defence was filed by the defendants, but on 27 January 1964, the defendants took out a summons under O 25 r 4 for an order that all proceedings in the action be stayed on the ground that it was frivolous, vexatious, and an abuse of court process. The application was supported by an affidavit stating, 'The action commenced by the writ of summons herein must necessarily fail because it was not brought within three years after the death of the deceased person in question'.

[10] The application came before Hashim J (as he then was) who adjourned it into open court for hearing, and in the event, made an order that the plaintiff's suit be dismissed.

[11] On appeal to the Federal Court, Thompson LP in dismissing the appeal had this to say at p 254:

> Now it is clear from the general course of reasoning upon which it is based and from the reference to the Real Property Limitation Acts that the case of *Dismore v Milton* [1938] 3 All ER 762, has no application in relation to a Statute of Limitations which is absolute and without exceptions.
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> Where there are exceptions which would affect the operation of the statute it is clear that a plaintiff need not plead them until the defence of limitation has been raised on the pleadings by the defendant (see *Dawkins v Penrhyn (Lord)* (1878) 4 App Cas 51, 59; *Busch v Stevens* [1963] 1 QB 1).
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> But that is not the position in the present case. The terms of s 7(5) of the Civil Law Ordinance are absolute and contain no exceptions. They are that 'such action shall be brought within three years after the death of the deceased person'. It is true that, as Goddard LJ said with reference to the corresponding section of the English Act, the section 'merely prescribes a period of limitation' (*Lubovsky v Snelling* [1944] 1 KB 44, 47) and that it does not contain a condition precedent or anything

of the sort. Nevertheless the period is absolute. There is no room for doubt as to when it begins to run. It runs from the death of the person of whose support the plaintiff has been deprived. The cause of action arises on death (see *Seward v 'Vera Cruz'* (1884-5) 10 App Cas 59, 67, 70). There are none of the saying provisions in favour of a plaintiff that were found in the Statute of James I and are to be found today in the English Limitation Act of 1939 or our own Limitation Ordinance of 1953. There is no question of infancy or disability or anything of the sort or of acknowledgment. The only way in which the consequences of the section could be avoided would be if there had been some agreement not to plead the statute and this would constitute a new cause of action (*Lubovsky v Snelling*) and would require to be set out in the statement of claim.

Finally, there can be no question of importing into the matter any of the saving provisions of the Limitation Ordinance by any process of construction for by section 3 of that Ordinance it 'shall not apply to any action ... for which a period of limitation is prescribed by any other written law'.

[12] In regard to the issue at hand, we are guided by the dicta of Thompson LP in the case of *Kuan Hip Peng* that a plea of limitation need only be pleaded where limitation is not absolute, such as under the Limitation Act 1953. It would not apply to a Statute of Limitation which is absolute, and without exception. In this case, we find that s 7(5) of the Civil Law Act 1956, and equally s 7(5) Civil Law Act (as amended in 1984) are absolute in nature. Hence, there is no necessity to plead limitation.

[13] The learned trial judge we hold was correct in holding that the claim under s 7 Civil Law Act 1956 must fail.

[14] In respect of the claim under s 8 of the Civil Law Act, the bone of contention was that the deceased was unemployed at the time of her death, and as such whether the estate was able to claim loss of earnings for the lost years of the deceased.

[15] The deceased's husband in evidence at the trial gave a glowing account of his wife's (the deceased) credentials. The deceased was an Applied Science graduate who majored in Computer Science, and on her return to Malaysia was employed in Singapore for a few months in August 1981 as a Computer Programmer by the firm of United Engineers (Singapore) Pte Ltd. She was paid a monthly salary of Singapore $1,000. She stopped work on 15 February 1982 when she was retrenched because of the recession in Singapore. It was admitted in evidence by the husband of the deceased that the averment in para 8 of the statement of claim that the deceased was employed as a Computer Programmer at the time of her death was an inexactitude. The witness alluded at some stage of his evidence, to the fact that his wife had actually given up her job in Singapore to start a family, and at the time of her death, they had a child of three months old. Again, this evidence we feel, should be viewed with caution, as the witness eventually admitted the deceased was retrenched from her job.

[16] The appellant's counsel tried to prevail on us that it was not fatal to the claim for 'lost years', that the deceased was unemployed, as there was sufficient evidence before the trial court, that with the deceased's expertise, and qualifications she would have eventually been able to secure

employment. The period of unemployment brought about by the recession in Singapore was a momentary hiccup, to a possibly bright career. There was, counsel submitted, a real prospect of an ability, and opportunity, to earn on the part of the deceased, to support the claim.

[17] Much as we sympathize with the valiant efforts of the appellant's counsel to impress upon us this point, we cannot with certainty say at this juncture, what the deceased's career prospects were going to be, would she have gone back to the work force after the birth of her child, or would she have grown to enjoy the bliss of being a home maker.

[18] In the case of *Chan Heng Wah & Anor v Peh Thiam Choh & Anor* (1988) 1 MLJ 74 that was cited by appellant's counsel to support his argument on this issue, with respect, in this particular instance at the time of the death of the deceased who was aged 20, evidence was adduced at the trial that she was a second year medical student in the National University of Singapore, had very good 'O' and 'A' Level results, was awarded a government scholarship to study medicine at the University, and was bonded to work for the Government for eight years upon completion of her medical studies. At the date of the accident, she had completed her first year examination, and her results were of average standard. Based on the evidence adduced, the learned trial judge quite rightly found that the deceased in this case would have qualified as a doctor, and went on to assess the net prospective earnings of the deceased. This approach of the trial judge was affirmed on appeal.

[19] As we stated a moment ago, earlier, we found, a paucity of evidence on the personality of the deceased, and whether in fact she was a consummate career woman or otherwise. Some other evidence of perhaps persons acquainted with the deceased, or references from previous employers, would have served as an index of her personality, and helped us in our assessment. In vain, there was little of this to work on. There is we find too much of guesswork and speculation expected of us, that we as judges should refrain from engaging in.

[20] We are thus not inclined to make any award in this respect, and to that end uphold the ruling of the trial judge, who dismissed this particular head of damages.

[21] The appeal was dismissed with no order as to costs.

Appeal dismissed with no order as to costs.

Reported by Eugene Jeyaraj